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In the Supreme Court

of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

MOTION OF PETITIONERS FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

BRIEF OF PETITIONERS ON THEIR MOTION FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas.
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

13-1178

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MOTION OF PETITIONERS FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

Come now petitioners in the above-entitled case and move the court to appoint a commissioner to take evidence and return the same to this court, on behalf of petitioners, and also on behalf of respondent if he should so desire, on some issues presented by the petition, the return of the respondent and by the reply. A brief is submitted in support of this motion.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

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BRIEF OF PETITIONERS ON THEIR MOTION FOR THE APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

The petitioners have presented a motion for the appointment of a commissioner to take evidence upon some issues raised by the return of respondent, and also by the reply of petitioners in the above case.

They desire to show by evidence the following points:

The affidavits of J. V. Parker and Charles R. Street, which were presented to the respondent judge by the attorneys for the insurance companies in the 150 cases referred to in the petition, at the hearing when the interlocutory injunction was granted by the respondent judge, and which affidavits were thereafter filed with the clerk of said court. These affidavits are referred to at pages 23 and 24 of the petition and at page 3 of the return of respondent. Copies, omitting certain rate schedules, are attached to the reply which we have prayed leave to file. That such affidavits were presented at that hearing is admitted in the return, and it is there asserted that they disclosed adequate ground for an interlocutory injunction without regard to any question of unconstitutionality of any statute

or order of any administrative board of the state of Kansas. The petition states that in the affidavit of J. V. Parker, he stated he was an actuary and was familiar with the rates charged by fire insurance companies in Kansas, and that his affidavit treated of the making of fire insurance rates and the classification of such rates; and that the affidavit of Charles R. Street stated that he was vice president of two insurance companies which did a fire insurance business, and he treated the subject of profits and the conduct of fire insurance business. Our contention is that these affidavits are both on the question of the adequacy and constitutionality of the rates fixed by the order in question of the former superintendent of insurance of Kansas.

The petitioners desire to show by evidence that on April 3, 1928, when an order was made in said cases in the district court and soon after the filing of the suits, in what we refer to as the Kansas cases, many similar suits were pending in the United States district court in Missouri by fire insurance companies as plaintiffs, herein referred to as the Missouri cases, and that many of the plaintiffs therein were also plaintiffs in the Kansas cases; that in the Missouri cases the plaintiffs applied for interlocutory injunctions; that a hearing was had before three judges in the latter part of April, 1928, and a decision rendered by them on the question of the interlocutory injunctions in April, 1929; that on April 3, 1928, there was a conversation between the attorneys for opposite parties in the Kansas cases, in which they concurred in the view that it would be desirable to defer a hearing in the Kansas cases until the decision by the three judges on the applications for interlocutory injunctions in the Missouri cases. There are allegations on this subject in paragraph VI, pages 15, 16 and 17 of the petition, and a denial in subdivision *e*, page 3, of the return.

Petitioners desire to show by evidence that at the hearing when the special master in chancery was appointed by the district judge,

upon May 10, 1929, the attorneys for the petitioners stated they did not consent to such appointment. The return alleges, paragraph VII, pages 8 and 9, that the petitioners by their conduct in the case, including that with reference to the appointment of the special master, waived the right to the assembly of the court of three judges to pass on the application for interlocutory injunction.

Petitioners desire to show by evidence that when the interlocutory injunction was granted by the district judge upon May 18, 1929, the attorneys for the petitioners stated to the judge that Commissioner of Insurance Hobbs intended to enforce the rate order and to do everything necessary for its enforcement, and that there was no statement or admission on behalf of the petitioners, and there was no evidence introduced to the effect that the petitioners threatened to revoke the licenses of the insurance companies and their agents because such companies had brought the suits referred to in the district court, and that the only evidence presented to the judge at the hearing of May 18, 1929, consisted of the verified bills and the affidavits of J. V. Parker and Charles R. Street.

The return alleges, in substance, that the interlocutory injunctions were granted on the ground that the petitioners threatened to revoke such licenses because of the bringing of the suits in the United States district court. (Paragraph II, page 4; paragraph III, page 5; paragraph IX, pages 10 and 11 of the return.) We challenge the correctness of these allegations in the return and maintain that nothing occurred and no evidence whatever was introduced before the district judge to that effect. We call attention to the fact that the motion of the insurance companies for an interlocutory injunction, upon which the district judge acted upon May 18, 1929, makes no charge of that kind. (Pages 12 and 13, exhibit 1 of the return.) The order of May 18, 1929, granting the interlocutory injunctions, makes no reference to any such ground. (See

appendix F, page 172 of the petition.) This order is not denied in the return.

One of the points upon which we desire to take evidence, that is, in regard to the allegations in the return to the effect that the petitioners threatened to revoke the licenses for the reason that the suits were brought in the United States district court, would be in contradiction of the allegations in the return that representations were made to the district judge by the insurance companies to that effect. The other points would not be in contradiction of any allegation in the return as to what occurred in the presence of the district judge. Under the circumstances in this case, we contend that we have the right to introduce evidence contradicting that allegation as to representations.

There are cases which hold that in a mandamus proceeding to require a judge of an inferior court to sign and settle a bill of exceptions, the statement of such judge, as to what occurred in the case in his presence with reference to the matters covered by the bill of exceptions, would be accepted by the judge who issues the ruling to show cause or the alternative writ in the mandamus proceeding. Those are cases, however, where it did not appear that the judge of the inferior court was deliberately acting in violation of a statute. Where, however, there is a question as to an alleged disqualification of the judge, his decision upon such question is not conclusive.

Some allegations in the petition are not denied by the return, and are therefore to be taken as admitted.

Among the allegations of the petition thus admitted are the following: At the hearing of April 3, 1928, of the application of the insurance companies for a restraining order, "the defendants, by their solicitors, then and there stated to the court that they requested it to assemble a court of three judges to hear the application

of the plaintiff for an interlocutory injunction. The said judge, in reply, stated, in substance, that: You will have a difficult time in getting a three-judge court out of me." (Paragraph IV, page 14 of the petition.)

At the hearing of May 10, 1929, when the district judge appointed a special master in chancery, the district judge "further stated that he did not like to call a court of three judges, and that he thought this case could be disposed of before it would be necessary to call a court of three judges to hear an application for an interlocutory injunction, and that if the plaintiff would apply to him before May 20, 1929, for a restraining order against the defendants he would grant it." (Paragraph XIV, pages 22 and 23 of the petition.)

It is now not controverted that the district judge announced the intention not to comply with the statute providing for three judges. (Sections 66 as amended of the Judicial Code; United States Code, title 28, section 380.) The respondent is in the position of deliberately attempting to defeat the operation of the statute. Such being the case it could not be the rule, it is not the rule, and there are no considered authorities to sustain any such rule, that the statement of the respondent as to what occurred in his presence in the hearings in the cases in the district court may not be contested by the petitioners. The petitioners should be permitted to show what the facts are upon the points not admitted or which are in controversy upon the pleadings.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

□

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In the Supreme Court of the United States

OCTOBER TERM 1929.

No. 20 Original.

EX PARTE

IN THE MATTER OF THE PETITION OF CHARLES F. HOBBS, COMMISSIONER OF INSURANCE OF THE STATE OF KANSAS and WILLIAM A. SMITH, ATTORNEY-GENERAL OF THE STATE OF KANSAS, for a Writ of Mandamus, TO THE HONORABLE JOHN C. POLLOCK, DISTRICT JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MANDAMUS.

RETURN TO RULE AND BRIEF IN SUPPORT THEREOF.

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. MCCLURE,
Counsel for Respondent.

JONES & BIRCH, TOPEKA

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MANDAMUS.

RETURN TO RULE.

Comes now respondent and in return to the rule entered upon him to show cause why a Writ of Mandamus should not issue against him "to call to his assistance two (2) other Federal Judges, as provided by Section 266 as amended of the Judicial Code, being Title 28, Section 380, United States Code, to hear and determine the motion and prayer of the plaintiff for an interlocutory injunction" etc., respondent answering says:

I.

The matters and things in said petition alleged and set forth are insufficiently and incorrectly set forth, and the statements of supposed fact therein are in error in the following specific particulars:

(a) There is no motion for interlocutory injunction in any wise pending in the court. The interlocutory injunction entered by respondent as a single judge (Appendix F, petition p. 172) was made pursuant to an application for interlocutory injunction to restrain cancellation of licenses, which motion was not upon the ground of unconstitutionality of any statute or order of any administrative branch of the State of Kansas nor is the said application upon which such injunction was issued set forth in the petition for mandamus. A true copy of the application filed by the plaintiff and presented to the court is hereunto attached and marked "Respondent's Exhibit 1."

(b) No application was before the court upon which action was taken or refused invoking a three judge court, nor any notice served upon the governor or attorney-general as provided by Section 266 as amended of the Judicial Code, being Title 28, Section 380, United States Code. Respondent says that the motion pursuant to such Act made by the plaintiff on April 11, 1928, (Appendix C to petition for mandamus, p. 95) was withdrawn (petition for mandamus, p. 22) and is no proper part of the record herein.

Further respondent says that the application for interloctuory injunction upon which respondent made his order for interloctory injunction was not nor was the making of such order in any wise upon the ground or basis, or upon the consideration of the question of constitution-

ty or unconstitutionality of any statute of the State of nsas, or any order of any administrative board of said ate.

(c) The affidavits presented by plaintiff upon applica- n for interloctuory injunction are mentioned in the tition for mandamus (pp. 23-24) but the contents there- not set forth. Respondent says that said affidavits, in njunction with the verified bill and verified motion for erlocutory injunction, disclosed adequate ground for in- locutory injunction entirely regardless of constitution- ty or unconstitutionality of any statute or order of any ministrative board of the State of Kansas.

(d) Petitioner, Charles F. Hobbs, Commissioner of surance of the State of Kansas, has threatened revo- ion of licenses of plaintiff insurance companies and ncellation of the licenses of their agents without any thority under the statutes of Kansas, (assuming the idity of all of them), and made no claim or assertion on the hearing of interlocutory motion of any act, or reatened act, of the plaintiffs in said causes in any wise thin the provisions of the statutes of Kansas providing revocation of licenses.

(e) Respondent specifically denies the allegation in Di- ion VI of the petition, and says that the actions pend- before respondent were in no wise suspended or action hheld thereon, or any agreement made to the knowl- ge of respondent, or any consent of respondent in any se had to suspend proceedings awaiting proceedings in her courts and specifically the three judge court in ssouri mentioned, and respondent says that the cases fore him pending have progressed without any sus- nsion thereof because of any of the supposed reasons said division of the petition mentioned.

II.

For further answer to the rule, respondent says that except as herein noted, there is no provision in the statutes of Kansas empowering petitioners, or either of them, to cancel licenses as a means of enforcement of the rate order complained of in the bill of complaint. The provisions of the Kansas statute respecting revocation of licenses are in the nature of penalties for acts committed, insolvency, and like conditions, none of which were shown or asserted on the hearing to exist.

Petitioners have specifically waived and disclaimed reliance upon the provisions of the statute providing for cancellation of licenses because of the filing of suits in the Federal Court and in printed briefs filed with this respondent upon their motion to dismiss the complaint.

Respondent says that the interlocutory injunction by him granted, and the application therefor, were not considered, based upon, or granted "upon the ground of the unconstitutionality of such statute", nor were the same an injunction or application for injunction "suspending or restraining the enforcement, operation, or execution of any statute, . . . or in the enforcement or execution of an order made by an administrative board or commission, . . . upon the ground of the unconstitutionality of such statute." (The words in quotations are from Section 266 of the Judicial Code stating requirements for a statutory three judge court.)

III.

The first application of the plaintiff for an interlocutory injunction, filed in April of 1928, was definitely abandoned and withdrawn by the plaintiff. The motion for an interlocutory injunction filed on May 16, 1929, a copy of which is hereto attached and marked Respondent's Exhibit I, was the only motion for an interlocutory injunction presented to the respondent. It did not appear to challenge the constitutionality of any statute or of any order of the commissioner of insurance. No notice of the hearing had been served upon the governor or the attorney general. The plaintiff definitely stated that it did not intend to press its prayer contained in its bill of complaint. The motion itself was limited to an application to restrain the commissioner of insurance from cancelling the license of the plaintiff and of its agents. It appeared to the respondent that the matter involved but one question and that the construction of the rate making statute, the applicants conceding for the purposes of the motion its constitutionality. Section 40-918, which corresponds with section 8 on page 177 of the petition for mandamus, authorizes the commissioner of insurance to revoke the license of a company if it has "violated any provision of this act." The plaintiff contends that it had not violated the statute by applying for a judicial review of the rate order as authorized by the statute, although it was continuing to collect the rate which obtained prior to the making of the order. The respondent, upon due consideration, held that the extreme penalty provided for "a violation of the act" could not be invoked because the applicant sought such judicial review, and where there had been no finding of or assertion of any other violation of the act. The enforce-

ment by the state of the rate order has not been restrained.

IV.

The respondent could not, under Section 266 of the code, assemble a three-judge court upon a motion where the applicants had not served the jurisdictional notice upon the governor and the attorney general even though it had appeared that the granting of the motion would of necessity be on the "ground of the unconstitutionality" of said statute. The respondent could deny the motion if the proper notices were not given and if so advised, but he could not assemble a three-judge court thereunder. There is not now and at the time of the motion of the petitioner herein, to-wit, on May 18, 1929, there was not pending before this respondent any motion in which the jurisdictional requirements of Section 266 permitted the assembling of a three-judge court.

V.

The order for injunction was carefully safeguarded so that if there were any violation by the plaintiffs respecting solvency, or conditions imposed on agents as recited in the statutes forming a ground for cancellation of licenses, the Commissioner of Insurance would be left free to proceed. He was only enjoined from cancelling licenses because of supposed violations of the rate order in question. The statutes make no specific provision for cancellation of license as a means of enforcement of a rate order.

VI.

For further return to the rule, petitioner says that a writ of mandamus ought not to issue because petitioners have an adequate remedy by appeal. The application for interlocutory injunction was not an application by the plaintiff under Section 266 of the Judicial Code as amended, for an interlocutory injunction upon the ground of unconstitutionality of a statute accompanied by a five day notice upon the governor and attorney-general of the State, nor was it an application to restrain enforcement or execution of a statute or order of an administrative board or commission acting under or pursuant to a statute asserted to be unconstitutional.

The only application for an interlocutory injunction before the court was the one set forth as respondent's exhibit 1, and upon it alone this respondent acting as a single judge has proceeded. The prayer of the petition herein and the rule upon respondent are to show cause why he should not proceed "to hear and determine the motion and prayer of the plaintiff", etc. Respondent has proceeded exactly according to the prayer of plaintiff's motion. Upon such application he has, according to the prayer and demand thereof for hearing before him alone entered an order which exhausted the power invoked by such application by granting the injunction as therein prayed for. Wherefore, respondent says there is nothing in any wise before the court requiring consideration of respondent or of three judges. Respondent states that the injunctional order so by him made is subject to appeal to the appropriate United States Circuit Court of Appeals by express authority of Section 129 of the Judicial Code.

Mandamus does not lie after notice of application for interlocutory injunction and ruling thereon, and entry of an order of injunction pursuant to such application.

VII.

For further return to said rule, respondent says that the prayer of the petition ought not to be granted because petitioners have waived the right to complain of a hearing before a single judge.

Respondent further says that plaintiffs did originally make an application for interlocutory injunction restraining enforcement of the statute and ruling of the administrative body, and for a hearing before three judges (Petition for mandamus, p. 95). Such application and the notice given thereunder to the governor and attorney-general were abandoned because of a pledge made by petitioners in open court and by them continued, pledging themselves to take no action subject of injunction and to permit no action which would be the subject of injunctional restraint (Petition, p. 14). Such pledge remained in full force from April, 1928, to May 20, 1929, during which interim, and because of such action of the petitioners, the plaintiffs were barred from applying for an interlocutory injunction and this respondent was barred thereby from instituting or creating a three judge court, or considering or granting or refusing an interlocutory injunction. During such interim, petitioners herein, being the defendants to said cause, presented a motion challenging the sufficiency of the bill of complaint, and asserting a claim of res judicata, copy of which motion so by petitioners filed is hereunto attached and marked "Respondent's Exhibit 2". Such motion was filed on May 7, 1928, and respondent as sole judge

and upon the motion of the petitioners (defendants to said suit) did have said matter under consideration, and heard arguments thereon, and considered briefs filed by the parties, and on the 8th day of January, 1929, decided such motion against the contention of the petitioners. In such interim, this respondent appointed a master in chancery and referred the case to a master for hearing, and made orders respecting depositions and the hearing of the cause, a copy of which order so appointing the master is hereunto attached and marked "Respondent's Exhibit 3."

Respondent further says that by the said pledge and action of the petitioners, and by barring the institution of a three judge court for more than a year, and by submitting the sufficiency of the bill of complaint to the respondent as a sole judge, and by submitting the sufficiency of pleadings to respondent, by permitting the matter to be referred to a master, by permitting an order for the taking of depositions, and so proceeding before respondent as the sole judge, thereby petitioners have joined in constituting respondent as the sole judge to hear said cause and waived any provision of the law for their benefit respecting institution of a statutory three judge court. Respondent further says that petitioners may not thus accomplish a change of venue by the device of a pretended withdrawal of their pledge to refrain from action subject to interlocutory injunction, and after an adverse ruling upon matters involving the merits of the matter compel the court to reconstitute the court upon a threat of cancellation of licenses not authorized by statute and no part of the power of enforcement of the statute and administrative order made pursuant thereto and resorted to as a mere device to reconstitute

the court so that the merits of the controversy may be submitted to a different tribunal.

VIII.

For a further return, respondent says that the bill of complaint of the plaintiff proceeds upon and gives jurisdiction to the District Court upon the ground of diversity of citizenship, entirely independent of the questions of constitutionality of statute therein raised, and therefore respondent says that the mere fact that an interlocutory injunction is asked or granted does not of necessity involve determination of any constitutional questions, nor necessarily require a statutory three judge court, nor necessarily involve an appeal to the Supreme Court.

IX.

The restraining order issued was collateral, or at most purely incidental, to the principal controversy. The plaintiffs did not seek any action restraining the state from enforcing the rate order. After the respondent ruled on the motion to dismiss, and decided that the validity of the rate order should be determined on its merits, the plaintiffs represented that the state was threatening to defeat the jurisdiction of the court by cancelling their licenses. To protect that jurisdiction, and without any constitutional claim being drawn into question, the order was issued. The plaintiffs could have presented the question of the power of the state to revoke their licenses because they brought an action in the courts of the United States to test the rate order, in an independent action; they can still do so; and if such

procedure had been or is adopted, no question could arise as to the assembling of a three-judge court. Such being, in substance, what was done, the defendants cannot demand a three-judge court simply because the form of the action taken was an incidental step in the main case, rather than independent actions.

WHEREFORE, having made full return of his reasons why a rule should not issue as prayed for, and having fully answered the said rule, respondent prays that the said rule may be discharged and said petition for mandamus may be dismissed.

JOHN C. POLLOCK,
Respondent.

ROBERT J. FOLONIE,
ROBERT STONE,
JAMES A. MCCLURE,
Counsel for Respondent.

RESPONDENT'S EXHIBIT 1.

MOTION.

Comes now the plaintiff in the above entitled cause and respectfully represents to the court that the plaintiff has heretofore made its written motion for temporary restraining order and motion for interlocutory injunction, and upon the coming on of said motions for hearing, the then defendants "in open court stated to the court that they would take no action and permit no action which would be the subject of restraining by temporary restraining order, without first giving notice to the plaintiff and its counsel of intentions so to do in ample time so that plaintiff may resort to this court for an appropriate order", and

The court thereupon made a finding "that the defendants are honorable persons whose assurance may be taken in such matters. The court does now accept their said assurance, and upon said consideration does refrain from entry of any temporary restraining order, with leave to the plaintiff to renew said application at any time if the plaintiff be so advised," said order being dated April 3, 1928.

Relying upon such pledge of defendants, plaintiff has refrained from prosecuting or presenting such matters, and refrained from prosecuting its application for interlocutory injunction.

Thereafter, and subsequent to the entry of said order aforesaid, the defendants did present before Honorable John C. Pollock, Judge of said Court, a motion of the defendants to dismiss the bill of the plaintiff, which motion was argued, briefs filed, and ruling of the Court was had thereon, said motion being overruled.

Thereafter, the defendants filed their answers. A reference of said cause has been had under the order of the Court to a special master, to-wit: Hon. Chas. G. Yankey, to hear the evidence and report thereon his findings of fact and conclusions of law; and an order has been entered by the Court for the taking of depositions.

Plaintiff further says that the defendants have now served written notice upon the plaintiff that they withdraw their pledge to the Court and will, if not restrained by order of the Court, after May 20, 1929, proceed "to enforce the rate order made by former Superintendent of Insurance, Travis, on January 20, 1922, which by its terms was to have taken effect on March 1, 1922, and which rate order is referred to in the bill of complaint of plaintiff in said case, "meaning and intending thereby, as this plaintiff believes and therefore alleges, to cancel the license of this plaintiff to do business in the State of Kansas, and otherwise proceed and act against the plaintiff to its irreparable injury and damage.

Plaintiff moves that an interlocutory injunction may be granted to it to restrain the defendants and each of them, their attorneys, agents and employees from in any wise cancelling the license of the plaintiff to do business in the State of Kansas, and that defendants be restrained from cancelling the licenses of the agents of the plaintiff because of any supposed violation of the said rate order aforesaid and the terms thereof, and that said interlocutory injunction remain in force until further order of the Court.

Whereas, an identical situation exists in each of the one hundred forty-nine (149) other similar cases brought in this Court by various insurance companies against the same defendants and upon identical causes of action, now, therefore, the plaintiffs in each of said causes, being numbered 962-N and 964-N to 1111-N inclusive, each makes like motion.

Robert J. Folonie,
Robert Stone,
James McClure,
Solicitors for Plaintiff.

Jurat—sworn to by Robert Stone.

RESPONDENT'S EXHIBIT 2.

MOTION TO DISMISS THE SUIT.

Come now William R. Baker, commissioner of insurance of the state of Kansas, and William A. Smith, attorney-general of the state of Kansas, defendants in the foregoing entitled cause, and move the court to dismiss the above entitled suit, for each and all of the following grounds, to wit:

1. The bill in equity filed by the plaintiff in said suit shows that the pretended cause of action alleged in said bill has been litigated by the plaintiff herein by suit in the state courts of Kansas, and that the supreme court of the state of Kansas has rendered a decision and judgment in said suit which upheld the rate order of the superintendent of insurance of the state of Kansas, complained of in said bill in equity, and decided and adjudged against the plaintiff herein, and that the supreme court of the United States has denied the application of the plaintiff for a writ of certiorari to review said decision and judgment of the supreme court of the state of Kansas. Said decisions and judgments of the supreme court of the state of Kansas and of the supreme court of the United States, alleged in said bill in equity, constitute *res judicata* of the pretended cause of action alleged in said bill in equity and constitute a bar to the maintenance or prosecution of the above entitled suit.

2. The bill in equity of the plaintiff herein does not allege sufficient facts to constitute a valid cause of action in equity in favor of the plaintiff and against the defendants herein, or either of them.

3. The bill in equity of plaintiff herein does not allege sufficient facts to show that the plaintiff is entitled to the relief prayed for by it against the defendants, or either of them.

WHEREFORE, Defendants pray that the above entitled suit be dismissed and that the costs be taxed against the plaintiff.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas,
ROLAND BOYNTON,
Assistant Attorney-general of the State of Kansas,
JOHN F. RHODES,
Solicitors for Defendants.

RESPONDENT'S EXHIBIT 3.

ORDER OF REFERENCE.

On this day there appear the parties hereto by their attorneys, R. J. Folonie and Robert Stone for the plaintiff, and John G. Egan and John F. Rhodes for the defendants, and plaintiff represents to the court its motion for an order of reference of this case and the appointment of a Special Master to hear the same.

Upon examination of the files herein and upon hearing said motion and being fully advised in the premises, the court finds that the issues in this action involve complicated matters of accounting; that the accounts involved extend over a period of years and that the same will involve a vast amount of evidence to an extent such as to make it difficult and impractical to have the case heard before the court; and that conditions exist which require the same to be, and the same should be, granted.

It is therefore by the court ordered that Chas. G. Yankey, of Wichita, Kansas, be and he hereby is appointed as Special Master in this action to hear and determine the issues thereof; and for that purpose this

action is referred to said Chas. G. Yankey; and it is further by the court ordered that said Chas. G. Yankey, as master, proceed in conformity with the rules to cause this case to be set down for hearing, notifying the parties of the time and place of such hearing; hear all of the evidence relating to the issues involved in this action, with full power to examine the parties and witnesses in this cause upon oath, touching all matters pertinent to this action, and to require the production of all papers and documents applicable thereto, and generally to do all other acts and direct all other inquiries and proceedings in the matters before him which he may deem necessary and proper to the justice and merits hereof and the rights of the parties; and said master shall at the completion of such hearing and in due time, make findings of fact and conclusions of law of and concerning the issues in this case and file the same together with all the evidence taken in the case with the Clerk of this Court. The said master is authorized to require the parties from time to time to make such deposits as may, in his judgment, be necessary to cover the expenses of this reference including compensation of stenographer or stenographers for the taking and transcribing of the testimony.

BRIEF IN SUPPORT OF RETURN TO RULE.

STATEMENT OF CASE.

The bill in equity invoking the jurisdiction of the court appropriately sets forth diversity of citizenship as a ground of jurisdiction (Petition for Mandamus, page 41) and discloses that the necessary jurisdictional amount is involved (Petition for Mandamus, page 40). In addition it asserts unconstitutional invasion of right by a rate order (Petition for Mandamus, page 40) and Federal unconstitutionality of sections of the statutes, pursuant to which the rate order was made, and in particular Section 3 of such rating act, purporting to empower the Superintendent to make rate orders (Petition for Mandamus, page 41).

Plaintiff in each of the cases in question was a fire insurance company and filed its said bill in March, 1928 (Petition for Mandamus, page 94). On April 11th, 1928, the plaintiffs in such actions made a written application for interlocutory injunction, restraining enforcement of statute and rate order, and praying for the assembly of a three-judge court (Petition for Mandamus, page 95). Appropriate notices were served upon the Governor and Attorney General at that time. (Return to Rule, page 8.) Such application for an interlocutory injunction was abandoned upon a pledge made by the defendants in open court that they would take no action subject to interlocutory injunctional restraint. Upon the making of such pledges the court ruled that an injunctional order was not necessary and could not be considered. This appli-

cation was abandoned and withdrawn. (Petition for Mandamus, pages 14-15). While such pledge was effective and in force, (it remained in effect for more than a year), the petitioners herein, (defendants below), presented a motion challenging the sufficiency of the bill of complaint and set up a defense of *res judicata* which were submitted to the respondent as a single judge (Respondent's Exhibit 2; Return to Rule, pages 14-15.) Such motion was filed on May 8, 1928, was briefed and argued, and was decided against the contention of the petitioners on the 8th day of January, 1929, (Return to Rule, page 9). Respondent, sitting as sole judge, also made an order appointing a master in chancery, and made an order of reference of the case, and made orders respecting depositions, and conduct of the case upon its merits. (Respondent's Exhibit 3; pages 15-16 of Return to Rule, and see also Return to Rule, page 9.)

Thereafter, on the 16th day of May, 1929, the plaintiffs made a new and verified application to respondent for interlocutory injunction (see Respondent's Return to Rule, page 5) and with such application filed affidavits disclosing the right to an interlocutory injunction. Such application for interlocutory injunction did not pray for formation of a statutory three-judge court, nor was the injunction urged or granted upon consideration of any claim of unconstitutionality of any statute, or order of any administrative board or commission (see application for interlocutory injunction; Respondent's Exhibit 1; pages 12-13 of Return to Rule). The plaintiff, upon such application, expressly announced that it did not request a three-judge court (Petition for Mandamus, page 172).

The reasons asserted, why a writ of mandamus should not issue against him as prayed are set forth in the return

o the rule and further presented in the argument and ill not be here reiterated.

ARGUMENT.

I.

In coming to correct conclusions as respects issuance r refusal of a writ of mandamus it is important that the ourt be not misled on the facts. Attention is in this divi-ion of our brief called to pertinent facts set forth in the eturn to the rule which go in contradiction or explanation f matter contained in the petition.

(a) An examination of the application for injunction hich is annexed as Exhibit C (Petition for Mandamus, age 95) might readily mislead the court into believing hat the application there appearing is pending before the ourt or was in some way involved in the hearing before he court when an interlocutory injunction was granted. uch is not the fact. The application appearing as Ap-endix C was not before the court, was withdrawn by the laintiff, and was expressly abandoned because of the ledge by the defendant (petitioners here) made in open ourt and recited in the order of April 3, 1928, wherein he petitioners expressly pledged themselves in open court ot to take any action subject to interlocutory injunction, hereupon the court declined to entertain such former pplication of the plaintiff (Petition for Mandamus, page 4).

(b) The only application for an interlocutory injunc-ion remaining in the record is application for interloc-tory injunction filed on May 16, 1929, copy of which is ttached to the return to the rule (Return to Rule, pages 2-13, being Respondent's Exhibit 1). Such application

was not based upon unconstitutionality of the statute or of the rate order mentioned in the bill of complaint, nor was the supposed unconstitutionality of any statute in any way considered by the court in granting such injunctional order. Such injunctional order was limited to restraining the petitioner, Chas. F. Hobbs, Commissioner of Insurance of the State of Kansas, from revoking the license of the plaintiff or its agents. For such threatened action he had no authority under the facts disclosed under any statute of the State of Kansas. There is no statute of the State of Kansas empowering him to revoke licenses as a means of enforcement of Section 3 of the rating act, pursuant to which he purported to make his rate order unless it be found in the sections hereinafter referred to. Neither is there any warrant by statute authorizing him to revoke licenses because of any violation of the rate order complained of. There was no showing of any kind on the hearing of such application that the plaintiff had committed any act of any kind coming within the provision of the statute giving rise to a revocation of licenses.

(c) The petitioner has not seen fit to set forth the affidavits presented upon the hearing of such interlocutory injunctional motion, although the petition shows that such affidavits were presented (Petition for Mandamus, pages 23-24). The verified bill of complaint and verified application for injunctional order restraining cancellation of licenses, together with such affidavits so mentioned but not set forth in the record, were ample to authorize the respondent to make an interlocutory injunctional order entirely regardless of the constitutionality or unconstitutionality of the rate order in question or the statute in question.

(d) There is no showing in the petition that there has been any action of the plaintiffs to the suits below, creative of any violation or claimed violation of a statute authorizing cancellation of licenses. The uncontradicted record is, that the petitioner, the Commissioner of Insurance, threatened to cancel licenses, although there was no action of any kind on the part of the plaintiff warranting such action. He was threatening to proceed without any warrant of law and not as an attempted enforcement of the statute of Kansas complained of in the bill or of the rate order therein mentioned. His threatened action was a purely wanton act, unauthorized by any power imposed on or remitted to him by law.

II.

The threatened action of the petitioner, Chas. F. Hobbs, Commissioner of Insurance of the State of Kansas, whereby he threatened to cancel licenses of the plaintiff and its agents was by a formal notice served by petitioners upon the plaintiffs (Petition for Mandamus, page 21), which was designed and intended as a threat that he would proceed to cancellation of licenses (see Plaintiff's Exhibit 1; Return to Rule, pages 12-13; see also Petition for Mandamus, page 22). The petitioner, Chas. F. Hobbs, Commissioner of Insurance of the State of Kansas, characterized his proposal to cancel licenses as an enforcement of his rate order and asserted the power of cancellation of licenses under statutes referred to in Division 18 of the Petition for Mandamus (pages 26-27), namely, Appendix J (Petition for Mandamus, page 182), and Appendix K, (Petition for Mandamus, page 184). Examination of these statutes discloses that they do not even remotely provide for revocation of licenses as a

means of enforcing the rate order set forth in the bill of complaint (Rate order appears in petition for mandamus, page 50, et seq.), nor are such provisions of the statute even remotely any authority to cancel licenses because of any supposed violation of the rate law in question (Section 3 of the rate law appears in petition for mandamus, page 175).

There is no assertion or claim that the Commissioner of Insurance has given any notice, or had any hearing, which are provided in the statutes providing for cancellation as conditions precedent to suspending certificate of authority, or that the plaintiff is "doing business" in violation of the law in any way. Power in said statute being that,

> "He may (after notice and hearing), if there is an unreasonable delay in restoring the solvency of such company and in complying with the law, revoke the certificate of authority of such company to do business in this state."

His power to cancel license under these two sections [App. J and K] is in the event of "insolvency or "doing business in violation of any of the laws of this state" (Petition for Mandamus, page 182). There was not even an intimation on the hearing or assertion or claim by the petitioners that there had been any notice by the Commissioner or any hearing by him, or that any ground for suspending or revoking licenses existed, or that plaintiff was "doing business" unlawfully. The injunctional order made by respondent restrains cancellation of licenses of plaintiff and its agents (Petition for Mandamus, pages 172-3). Petitioner asserts that he has power to revoke the licenses of agents as a means of the enforcement of his rate order (Peti-

tion for Mandamus, page 27). This statute is set forth as Appendix K to petition for mandamus at page 184. Such statute provides for the revocation of agents' licenses in the following cases only:

1. That a license was obtained by fraud or misrepresentation.

2. That the agent has misrepresented the terms and conditions of a contract of insurance.

3. That he has paid rebates of insurance premiums.

4. That he has made misleading misrepresentations or incomplete comparisons of policies.

5. That the interests of the insurer or the insurable interest of the people are not properly served under the license.

Such revocation as provided may only be had upon reasonable notice and hearing. There was no claim or assertion that there had been any notice, or any hearing, or that there was even an assertion of breach by any agent of the plaintiff of any of the conditions of such statute, but nevertheless it was proposed to cancel their licenses wholesale without any reason whatever, except the conclusions as stated in the petition (and not provided in the statute) that such revocation was a "means by which the Commissioner of Insurance can enforce such rate order" (Petition for Mandamus, page 27).

The interlocutory injunctional order restrains the Commissioner of Insurance only from cancelling licenses of the plaintiff and its agents, "because of any supposed violation by plaintiff of the rate order made by the Superintendent of Insurance of Kansas, issued January 20, 1922, effective March 1, 1922", (Petition for Mandamus, page 172). It is respectfully submitted that this injunctional order restrains nothing authorized or warranted

by the statutes, set forth with the petition for mandamus as Appendix J and Appendix K. The Commissioner is left entirely free to proceed under those statutes for any breach provided for in either of them. Neither statute covers what is barred by the injunctional order, namely, cancellation of licenses because of supposed violation of a rate order.

In the petition for mandamus, the statutes designated Appendix J and Appendix K are apparently relied on as the sole authority to the Commissioner of Insurance to make revocation of licenses.

There is one other section under which the Commissioner might claim the power to cancel plaintiff's license, but upon which he apparently does not rely because it is not referred to in the petition for writ of mandamus. This section appears in Exhibit H, page 177, and is as follows:

> "Sec. 8. That the superintendent of insurance, if he shall find that any insurance company, or any officer, agent or representative thereof, has violated any provisions of this act, may, in his discretion, revoke the license of such offending company, officer, or agent; but the revocation of any license, as provided in this section, shall in no manner affect the liability of such company, officer, agent, or representative to the infliction of any other penalty hereinafter provided by any other section for violation of this act."

We agree with the implied position of counsel for petitioners that this section has no application to this case. It is a penalty as indicated by the phrase, "Any other penalty" to be used for some wilful violation of the law. It is not intended as a means for enforcing any order of the Commissioner. It certainly is not intended for use against an insurance company which sees fit to avail

itself of the provisions of the following section (9) to set aside, vacate, or annul an order of the Commissioner. The plaintiff in this case has brought suit to set aside, vacate, and annul the rate order in question. By bringing this action, it has not violated any provision of this act, but has acted in pursuance of the provisions of the law by the terms of which

> "The court may permit any company complaining under this act to write insurance at any rates which it obtained prior to the ordering of the rate complained of, etc."

In compliance with this very provision, the plaintiff in this case in the joint action of insurance companies brought in the state courts has charged and it still charging the rates which it obtained prior to the ordering of the rate complained of, the excess amount so collected being still on deposit in the banks of Kansas (Exhibits to petition for mandamus, pp. 65 and 116) in the sum of $14,324.38 and further secured by a bond in the sum of $10,080.89 (Exhibit to petition, pp. 65 and 116), and this court has authority under the same section to permit the continuance of the charging and collection of the pre-existing rates under the same proviso.

It certainly is not intended by the Legislature that the severe penalty of revocation of a license should be used as a means for enforcing an order against a company which, in compliance with the terms of the law, was seeking to obtain a judicial construction of the order.

It will be observed that the motion of the plaintiff filed on May 16, 1929, and the order of May 18, 1929, granting said motion, are expressly limited to restraining and enjoining the cancelling of the license of the plaintiff because of "any supposed violation by plain-

tiff of the rate order made by the superintendent of insurance." The Commissioner is still left many other means for the enforcement of the order, and is still left free to cancel the license of the plaintiff on account of any other act or failure to act on the part of the plaintiff which would subject it under the terms of the law to a cancellation of its license. The only motion before the court asking for any injunction or restraining order was the one filed on May 16, being respondent's Exhibit 1 attached to the Return. Action upon this motion calls simply for a construction of the statute. It did not involve in any way constitutionality of any statute or of the order of the superintendent of insurance. It was not a matter requiring the assembling of the three-judge court. Section 266 of the Judicial Code provides

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of the state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order . . . shall be issued or granted . . . on the ground of the unconstitutionality of such statute, etc."

The issuing or granting of the injunction was not and could not be upon the ground of the unconstitutionality of such statute. So far as the granting of the motion is concerned, the validity of the statute was not called in question.

Injunction restraining such cancellation therefore is not any action for the enforcement of the rating statute, said to be unconstitutional, and therefore not within the provision of section 266 of Judicial Code. The injunction is limited to a restraint only against cancellation of license because of any supposed violation of the rate order re-

specting which no violation was asserted or claimed upon the hearing of the motion. The other reasons for cancellation which may exist under the statute are left unaffected by the injunction. The rate order was made under Section 3 of the Rating Act (Petition for mandamus, p. 175). The cancellation provision appearing in Section 9 is not asserted or claimed to be violated, or any act done other than continuing to charge and collect the pre-existing rates which could be construed as a violation of the rate order or the statute justifying it, unless it might possibly be violation of the prohibition appearing in Section 9 (Petition for mandamus, p. 179) where the provision appears "No action shall be brought in any of the courts of the United States to set aside any order made by the Superintendent of Insurance under the provisions of this Act before all of the remedies provided for herein shall have been exhausted by the party complaining." Cancellation of license is provided for violation of such provision. But for what is set out in the return it might possibly have been claimed that the plaintiff insurance company violated this provision by bringing the action in the District Court in which the injunctional order was made. The petitioners, however, have expressly waived and disclaimed reliance upon such provision of the statute and have, in printed brief filed with respondent upon motion to dismiss the suit, disclaimed reliance on such provision or any violation of it. In their brief before respondent, upon motion to dismiss suit, the petitioners say:

> "The statute could no more prevent a Federal Court taking jurisdiction if the remedy in the state court were administrative than if it were judicial. In either event, the provision would be ineffective to prevent a Federal Court taking jurisdiction."

They further say in their brief:

> "The provision referred to in the Kansas statute was therefore ineffective whether the suit in the state court to contest the rate order of the Superintendent of Insurance should be regarded as a judicial proceeding or an administrative proceeding, the Kansas rate statute was enacted in 1909 before the cases of Doyle v. Continental Insurance Co. and Securities, etc. Company v. Prewitt had been overruled."

The petitioners having expressly waived and disclaimed reliance on such provision, there is no remaining act charged or asserted against the plaintiff which could be claimed, or was asserted to be a violation of the rate order.

If it were assumed that the statutes permit cancellation of license as a means of enforcement of the rate order, and that all the views expressed in the foregoing section are in error, mandamus would still be inapplicable because the application for the injunction and the granting of it were not to restrain enforcement of the rate act or the statute, pursuant to which it arises, upon the ground of unconstitutionality. The motion and the injunction granted pursuant to it were *not* (a) pursuant to notice to the governor and attorney-general; (b) nor to restrain enforcement of statute or administrative order; (c) nor upon the ground of unconstitutionality.

The application was to a single judge without any attempt to comply with the provisions of Section 266 of the Judicial Code. Procedure under that section was expressly disclaimed (Pet. for Mandamus p. 22.) Neither was the unconstitutionality of any statute presented, considered, or determined in considering the application and ruling upon it. In consequence, the order is not one pursuant to Section 266 of the Judicial Code nor upon

the grounds of unconstitutionality of any statute, and therefore is an order which, by express direction of the statute, is appealable to the United States Circuit Court of Appeals.

III.

The chief ground for cancellation of license of an insurance company under the Kansas statutes is in case of insolvency. The whole tenor of the statutes relates to the question of solvency or insolvency as a test for revocation of license (Petition, p. 182). It is true that such statutes contain the provision that cancellation may be had in the event "that the solvency of any such insurance company is impaired, or that it is doing business in violation of any of the laws of this state." It is apparent from the examination of such statute that what is in contemplation in the statute is a failure of the company to comply with those directions of the statute authorizing it to enter upon the doing of business, and bearing upon the proof of solvency, the organization of the company and other attributes forming a basis for its entry into the state. The statute provides for notice and hearing, and other conditions precedent to revocation of license, none of which have been taken by the petitioner and with none of which he proposed to comply, as the matter was presented to respondent on the application for interlocutory injunction. The provision for notice and hearing (Petition, p. 182) applicable to revocation of a company's license are also applicable in case of an agent's license (Petition, p. 184), and there is no authority even remotely in these statutes authorizing cancellation of license as a means of enforcement of

a rate order. The order enjoining cancellation of license was carefully safeguarded so that the Commissioner of Insurance would be free to proceed with cancellations of license upon any ground he might have, other than supposed violation of the rate order before the court, respecting which the statutes gave him no power.

If the respondent were in error in his conclusion respecting the power under the statutes to cancel a license the matter would be error subject to correction on appeal and not by mandamus as the application and the court order pursuant thereto did not proceed upon the ground of unconstitutionality of any statute.

IV.

Petitioners have an adequate remedy by appeal to the Circuit Court of Appeals, which is provided by Section 129 of the Judicial Code. An appeal is expresly authorized in case of issuance of an interlocutory injunction order. This court has frequently granted mandamus but only in aid of its appellate jurisdiction in cases where no appeal could be had from action taken or refused. A typical case where mandamus will lie because there is no right of appeal, is in a case where a plaintiff makes an application for interlocutory injunction, praying that the matter may be heard before three judges, serves statutory five day notice upon the governor and the attorney-general, and upon the coming on of such application the district judge, acting alone, denies such application or refuses to act upon it. In such hypothetical case it is not appealable for the reasons:

(a) The case is not appealable to the Supreme Court because it was not heard before three judges, and only a case so heard is appealable to the Supreme Court.

(b) The case is not appealable to the Circuit Court of Appeals because the application for interlocutory injunction proceeds upon the ground of unconstitutionality of a statute, and such an order is not appealable to the Circuit Court of Appeals.

The present case does not fall within the class of cases so assumed because:

1. The application for interlocutory injunction did not proceed upon the ground of the unconstitutionality of any statute.

2. It was not made pursuant to notice to the governor and the attorney-general.

3. The plaintiff expressly disclaimed that it was proceeding under Section 266 of the Judicial Code, and expressly disclaimed asking for three judges or proceeding under Section 266 (Petition, p. 22).

The plaintiff in such action not proceeding under Section 266 of the Judicial Code in compliance with its conditions, and expressly disclaiming that it proceeded under such section, placed respondent in the position where acting as a single judge he must grant or refuse the application upon the merits of it, free from any consideration of constitutional grounds of attack. For the purpose of the motion respondent must treat the provisions of the statutes of Kansas as constitutional and valid measures, and determine the motion exclusively upon the assumption that such statutes although valid gave no power for cancellation of license. Or he might find that under the facts there was no breach or asserted breach falling within the terms of the statute, and therefore regardless of its constitutionality the respondent

was authorized to determine such motion for or against the application. He may have determined the question erroneously, but that is not here for consideration. That can be determined only upon appeal to the United States Circuit Court of Appeals. The District Court has exhausted all of the powers invoked by such application by granting the injunction. Petitioners did not proceed by mandamus after notice of the application for injunction, and before ruling thereon, nor request the court to refrain from issuing an injunction order until they could have made an application for mandamus, which doubtless would have been granted, but proceeded to present the merits of such injunctional application and permit the matter to proceed to the point of an injunctional order. If the application for mandamus would lie at all, which we deny, it is clearly too late because an injunction has issued *according to the prayer of the application* for an injunction. The plaintiff in the suit below could not be required to present constitutional attacks upon a statute as grounds for an interlocutory injunction if it saw fit to proceed on other grounds, as it did. It was within the power of the plaintiff below to proceed for an interlocutory injunction regardless of constitutional considerations if it were so disposed. The petitioners here (defendants below) are not in position to ask for an injunction order against themselves, and are not in position to control the action of the plaintiff as to how it shall apply for an injunction or what the scope of plaintiff's prayer for injunction shall be. The defendants to an injunction suit may resist an application for an injunction, but may not change the scope of the application, for an injunction, as presented by his opponent. If the plaintiff in such a case applies for an injunction

before a statutory court, and complies with Section 266, the defendants are not in position to complain if a single judge *denies* the application. Likewise, they are not in position to complain of an interlocutory injunction granted by a single judge upon an application made by the moving party, the plaintiff, for an injunction before a single judge, upon grounds other than constitutionality of a statute or administrative order, except as they have a right of appeal from such injunctional order if the same is asserted to be unwarranted upon the facts.

V.

The petitioners have waived the right to complain of a hearing before a single judge. Section 266 of the Judicial Code providing for a statutory three-judge court is to the effect that the suspension of a statute by enjoining operation of a state law, or order of an administrative body, shall not occur except on solemn determination by a court of three judges. The purpose of the law is to prevent arbitrary or ill-considered action, and to safeguard the suspension of a law before hearing upon the merits is had. A single judge is regarded as equally qualified as three judges to determine such matters when all the evidence has been produced. It is only in case of application for an interlocutory injunction which seeks to *suspend* the operation or execution of a statute or administrative order upon the *ground* of the *unconstitutionality* of such statute under the Federal Constitution that three judges are required. Prior to the application for an interlocutory injunction here for consideration, the plaintiffs had made an application for an interlocutory injunction and a hearing before three judges (Petition for mandamus, p. 95), but such appli-

cation and the notice thereunder to the governor and attorney-general were abandoned and eliminated from the record. The application for a general order of injunction restraining enforcement of the statute because of its unconstitutionality was withdrawn because of a pledge made by petitioners in open court, pledging themselves to take no action and to permit no action which would be the subject of injunctional restraint (Petition, p. 14). In reliance on such pledge, the court expressly refrained from making any order or giving any consideration to such application, which was made in April, 1928 (Petition, p. 14-15). The pledge of the petitioners was kept in force until May 20, 1929, (Petition for mandamus, p. 22). In the meantime; (that is, from April, 1928, to May, 1929,) the institution of a statutory three judge court and application for an interlocutory injunction on account of unconstitutionality of the statute were prevented by actions of the petitioners. During all that period of more than a year, the district judge, respondent herein, and the plaintiffs to the suits below were barred by acts of the petitioners from instituting or creating a three judge court, or considering or granting any interlocutory injunction. While the matter was in that position, the petitioners (Defendants below) presented a written motion challenging the sufficiency of the bill of complaint and asserting that the same was barred by res judicata (Respondent's Exhibit 2, Return to Rule, pp. 14-15). Such motion of the defendants was filed on May 8, 1928, and questions presented thereby decided by the respondent as a sole judge upon motion of the petitioners on the 8th day of January, 1929, on which date the respondent decided such contention against the petitioners. The respondent, thereafter and before the threat to

cancel licenses, appointed a master in chancery and referred the case to him for hearing, and made orders respecting depositions (Respondent's Exhibit 3, Return to Rule, pp. 15-16). Petitioners have, by their own action, caused respondent to proceed as a single judge and take jurisdiction over the action and have by their pledge deprived the plaintiffs of the power of instituting a statutory three judge court. Having submitted the sufficiency of the bill of complaint to a single judge and settled pleadings, permitted reference to a master, and entry of sundry orders pertaining to the merits, petitioners have by their own actions joined in creating a court consisting of a single judge. They have by such actions waived any provisions of the law made for their benefit as respects creation of a statutory court, and have submitted the matter to a single judge for decision. By their actions, the matter was, from a legal standpoint, placed in the same position as if there were no application for interlocutory injunction in which case a final hearing need not be had before three judges. T. L. Smith, Sr. v. Louis J. Wilson, 273 U. S. 288.

The action of the petitioners in pretending to withdraw their pledge and threatening to cancel licenses was not done in a bona fide desire to cancel licenses, but in the belief by the petitioners that by serving a notice withdrawing their pledge they would thereby force the plaintiff to action which would reconstitute the court and thereby the petitioners could secure what was in effect a change of venue from the respondent whose decision on the motion to dismiss the bill was not to their liking. Section 266 of the Judicial Code is not to be extended beyond the purposes defined therein. It is detrimental to the interests of justice that defendants to a suit may

make a pledge of action, not controllable by the opponents to the suit, whereby they debar the court and the opposing parties from securing an interlocutory injunction; debar them from instituting a statutory court to hear the application for an interlocutory injunction (by statement that they do not intend to enforce the rate order and will take no action subject to interlocutory injunction); and thus keep a single judge if they will or reconstitute the court at their will if the judge later displease them. Petitioners may not justly submit the merits to a single judge by a motion to dismiss, and retain a single judge if he rules favorably to them, and withdraw their pledge and secure a new court who may reverse his ruling if his decision proves unsatisfactory. The action of the petitioners in this respect is comparable with their action in presenting a petition for mandamus herein, which upon its face would naturally leave the impression with the court that the injunction granted was pursuant to application under Section 266 of the Judicial Code, whereas, they well knew that the application appended to their petition was expressly withdrawn and was not the one under which the court proceeded. It is true that the fact of withdrawal of this application is set out in the body of the petition, but it is so covered up that the court might well be misled, and the petition bears every indication that the petitioners were extremely careless or willing that the court should fall into error in the matter.

VI.

The bill of complaint establishes jurisdiction in the district court upon the grounds of diversity of citizenship entirely independent of constitutional questions involved. The jurisdiction not being dependent solely upon Federal Constitutional grounds, and the district court having jurisdiction of the controversy entirely regardless of such issue, when application for an interlocutory injunction is made, it may be dependent upon constitutional grounds or it may not. In a case where the sole power of the court to take hold of the controversy rests upon a constitutional attack on a statute, then the application for interlocutory injunction commonly involves a constitutional inquiry. Where the court has jurisdiction on the ground of diversity of citizenship, however, an application for injunction when presented may or may not proceed upon Federal Constitutional grounds. In this case, the interlocutory injunction prayed for and granted did not involve a decision of constitutional question, and such application does not invoke a statutory three judge court, nor necessarily require an appeal from a final decree to the Supreme Court of the United States. Lemke v. Farmers Grain Co., 258 U. S. 52. An application for mandamus in this court is an exercise of this court's appellate jurisdiction. Maryland v. Loper, 270 U. S. 9. Such appellate jurisdiction may not be invoked in a case which upon a final hearing will (so far as the present state of the record discloses) upon final hearing be appealable to the United States Circuit Court of Appeals and not to this court. Ex parte Glaser, 198 U. S. 171.

In conclusion, we respectfully submit that for all the grounds foregoing, mandamus ought not to issue; that the respondent is right in his view as set out in his

return to the rule, that a statutory three judge court is an exceptional court and not the rule, and should be instituted only in cases clearly requiring it. The institution of such a court is cumbersome; it makes for delay by calling busy judges from their homes to foreign cities. We can think of nothing more futile than to solemnly assemble three judges to convene in Kansas to hear an application to restrain cancellation of licenses where the sole ground presented in support of such application is that there is no power under the statute to cancel licenses because a company seeks a judicial review of a rate order when that threatened cancellation of license is not for breach of any statutory inhibition but lawless use of power. Such an argument, if presented before three able judges, would present none of the aspects of suspension of a statute on the ground of unconstitutionality which is the sole situation in contemplation of the Section 266 of the Judicial Code. The rule on the respondent ought to be discharged and the petition for mandamus dismissed.

Respectfully submitted,

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ROBERT STONE,
JAMES A. MCCLURE,
Counsel for Respondent.

SUPPLEMENTAL.

At the outset of this litigation, the plaintiffs made application for a temporary injunction under section 266 of the Code, serving the jurisdictional notices upon the governor and attorney general. That application was not pressed, because counsel for the defendant agreed that no effort would be then made to enforce the orders. No threat existing to enforce the order, no three-judge court could be assembled; and the application under section 266 was later expressly withdrawn.

If the pledge had not been made, the application for a statutory court would have been pressed and would have been granted and the matter of the sufficiency of the bill and other steps looking toward a disposition on the merits, would have been heard by three judges. Relying upon the pledge, however, the respondent heard arguments on the many complicated and difficult matters presented by the motions to dismiss; considered exhaustive briefs, and in fact spent all his available time for many months on this important litigation. It is submitted that it is unfair for petitioners, having had the benefit of such exhaustive study by respondent, and having lost, to now assert the right to re-submit his case to a three-judge court. Respondent would not have devoted many months of time to the consideration of petitioner's motion to dismiss and his briefs in support thereof, if he had been advised that petitioner intended, if he lost, to then ask for a three-judge court.

Later in the litigation, and after an adverse ruling on the motion to dismiss, the petitioner even then did not threaten to appropriately enforce the rate order in question. The rate statute expressly provides for a judicial review of a rate order, on condition of impounding pre-

miums, etc. This case is *under* the precise terms of the statute, the defendants impounding such premiums. No penalty can be enforced for seeking such judicial review. The rate statute does provide a penalty—the cancellation of the license—as a penalty for a company who "violates" the statute, but such penalty cannot in the judgment of the respondent be invoked against a company who proceeds under the statute. The provision for judicial review would be worthless if a commissioner could forfeit the license of a company because it seeks a judicial review of a rate order.

The plaintiffs have not asked, and do not now ask, for an interlocutory injunction against the enforcement of the rate order. The defendant takes the initiative, not by threatening to disburse the impounded funds, or to otherwise enforce the rate order, but by a threat to cancel the licenses of the companies as a penalty for the plaintiffs' seeking a judicial review *under* the statute. The defendants demand the three judge court.

The plaintiffs then apply for an interlocutory injunction against this threat of a penalty for coming into court. No question of constitutionality of any statute or order is presented. The only question presented is one of statutory construction, to-wit, under the statute, conceding its constitutionality, can a company's license be forfeited because it asks a judicial review of a rate order?

Rightly or wrongly, the respondent decided that such statute, properly construed, could only be used to punish a company which violated the statute, and not one which was proceeding under it. If that construction is erroneous, it can be corrected on appeal.

For it would be impossible for the respondent to assemble a three judge court, under the application on file,

because the plaintiffs have not served the jurisdictional notices on the governer and attorney general. The respondent may have erred in his construction of the statute and in granting the interlocutory injunction; but he could not assemble a three judge court under that application, the only one pending.

The restraining order issued was only an incidental step in the main case. The situation was the ordinary one of a party having lost on a protest of sufficiency of the bill, then undertaking to defeat the jurisdiction of the Court the plaintiff, first asked to restrain the enforcement of the rate order, but for reasons of its own withdrew that request. That left the state free to enforce the order. The state then challenged the sufficiency of the bill, and the bill was held sufficient. Then, the respondent was advised that, because of the pendency of the suit, or because the motion to dismiss had been ruled adversely to the Commissioner for some other reason, the Commissioner threatened to cancel the license of the plaintiff. The plaintiff perforce must abandon its lawsuit, rather than have its license cancelled.

That situation was presented to the court. No constitutional question was involved. No question of enforcing the rate order was involved. The only question was the power of the Commissioner, under the statute, to cancel licenses without notice or hearing, and simply because the rate order was challenged in court. Nothing but statutory construction was involved. The plaintiff did not proceed under section 266. No question covered by section 266 was presented. At the time, it occurred to respondent, that the question more properly should have been made the subject of an independent action, rather than mixing it up with the rate case, to which it was at best only incidental; that, more accurately, the

rate case was the cause of the threat—a fact involved in the matter, rather than the source of it. No party objected to taking the matter up in the rate case, rather than by independent action, the respondent did not raise the point and passed upon the motion.

The propriety of mandamus can be tested by that point. No one, it is believed, would deny the propriety of a simple bill of complaint, alleging the threat, that no power existed to cancel licenses because of the suit to test the order, and asking for an injunction. If that had been done, if it was now done, no three judge question would have arisen. Yet that is this case, complicated only by the fact that plaintiffs entitled their pleading in this case instead of in a new one.

JOHN C. POLLOCK,

Respondent.